STATE OF MICHIGAN

COURT OF APPEALS

JOEL DOCKETT,

Plaintiff-Appellee

v

KRAMER ENTERTAINMENT AGENCY, INC.,

Defendant-Appellant.

UNPUBLISHED
February 24, 2005

No. 252463
Kent Circuit Court
LC No. 00-011376-CK

Before: Schuette, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Plaintiff sued defendant for breach of contract, seeking to recover commissions that he asserted he earned during his employment with defendant, but for which he was not paid. Defendant asserted that other employees had sold the events for which plaintiff sought to be paid, and maintained that plaintiff was therefore not entitled to any commissions for those sales. Following trial, the jury returned a verdict in favor of plaintiff. Defendant appeals as of right the trial court's denial of its motion for judgment notwithstanding the verdict and a new trial. We affirm.

Defendant first argues that the trial court erred in denying its motion for judgment notwithstanding the verdict. We disagree. We review de novo a trial court's decision on a motion for JNOV, and review the evidence and all legitimate inferences that may be drawn from the evidence in a light most favorable to the nonmoving party. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491-492; 668 NW2d 402 (2003). "The motion should be granted only if the evidence fails to establish a claim as a matter of law." *Id*. at 492. "If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand." *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998).

Defendant maintains that sales territories were assigned by schools and not by states, that no sales agent has ever had an exclusive territory in any given state, and that other sales agents booked the shows for which plaintiff claimed he was owed commissions. Defendant argues that plaintiff's claim was therefore contingent on establishing that he was given entire states as exclusive territories and that he was entitled to commissions for any show sold by any sales agent at any school in that state, and that plaintiff failed to present sufficient evidence to support this claim. However, defendant fails to recognize that the jurors were free to disbelieve defendant's witnesses regarding who sold the shows for which plaintiff claims to be owed commissions, and were free to believe testimony that supported plaintiff's claims.

Contrary to defendant's characterization of plaintiff's case, plaintiff testified that he actually sold the shows for which he sought payment and that credit was given to other sales agents for those shows. Further, plaintiff testified that he was assigned specific schools by defendant and did not consent to their reassignment as required by the contract and therefore, that he was entitled to compensation for shows sold to the schools, regardless of whether he actually sold the shows. Under either circumstance, plaintiff felt that he was entitled to the commissions under his contract.

Plaintiff concedes that the witnesses presented by defendant, if believed, contradicted all or part of his claims. However, the jury was entitled to believe plaintiff's testimony and those portions of the testimony of other sales agents and defendant's director of marketing that supported plaintiff's claims, and to disbelieve testimony that favored defendant. In denying defendant's motion for JNOV, the trial court concluded, based on its review of the testimony presented at trial, that reasonable jurors could disagree as to whether plaintiff was entitled to payment of the claimed commissions. This case involved conflicting testimony and issues of credibility regarding plaintiff's performance, compensation, and conduct during his employment with defendant, which were issues properly left to the jury. *Campbell v Sullins*, 257 Mich App 179, 194; 667 NW2d 887 (2003). Because reasonable jurors could honestly have reached different conclusions, the jury verdict must stand. *Central Cartage*, *supra* at 524. Viewing the evidence and all legitimate inferences drawn therefrom in a light most favorable to plaintiff, we find that the trial court did not err in denying defendant's motion for JNOV.

Defendant next argues that the trial court abused its discretion in denying its motion for a new trial, because the verdict was against the great weight of the evidence. We disagree. We review the trial court's decision on a motion for a new trial for an abuse of discretion. *Hilgendorf v St. John Hosp and Medical Ctr Corp*, 245 Mich App 670, 682; 630 NW2d 356 (2001). In deciding whether to grant or deny a motion for a new trial on the basis that the verdict was against the great weight of the evidence, the trial court must determine whether the overwhelming weight of the evidence favors the losing party. *Phinney v Perlmutter*, 222 Mich App 513, 524-525; 564 NW2d 532 (1997). We give substantial deference to a trial court's determination that a verdict was not against the great weight of the evidence. *Id*. at 525.

Here, the trial court concluded, after discussing the trial testimony at great length, that the verdict was not against the great weight of the evidence and was not influenced by passion, prejudice, or other unlawful or impermissible bases. Given the testimony of plaintiff and others, discussed above, we defer to the trial court's determination that the verdict was not against the great weight of the evidence, and conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant next argues that there was insufficient evidence presented at trial to support the jury's damage award. Specifically, defendant argues that because plaintiff presented no evidence upon which to base any damage award for asserted lost commissions in 1997 or 1998, any damages awarded for those years are speculative. We disagree. Defendant failed to object to plaintiff's suggested method of calculating damages, as well as the jury instructions pertaining to damages. Further, defendant failed to argue that the damages were excessive in its motion for JNOV or a new trial, and failed to seek remittitur below. A party is required to move for remittitur to preserve an argument that a damage award is excessive. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 315; 660 NW2d 351 (2003). Further, any challenge to the

sufficiency of the evidence in a civil case is waived by a party's failure to raise the issue in a timely motion at trial. *Napier v Jacobs*, 429 Mich 222, 238; 414 NW2d 862 (1987). Defendant's failure to challenge the damage award by seeking remittitur or by challenging the sufficiency of the evidence regarding the amount of the damages in his motion for JNOV or a new trial has waived this issue on appeal.

However, even if defendant had not waived the issue, there was sufficient evidence presented to the jury to allow them to undertake a reasonable method of calculation, and to support the verdict reached. When reviewing defendant's claim that there was insufficient evidence to support the award of damages, we "must view the evidence in a light most favorable to the plaintiff and give the plaintiff the benefit of every reasonable inference." *Scott v Illinois Tool Works, Inc*, 217 Mich App 35, 41; 550 NW2d 809 (1996). "If, after viewing the evidence, reasonable people could differ, the question is properly left to the trier of fact." *Id*. As this Court explained in *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995):

> A party asserting a claim has the burden of proving its damages with reasonable certainty. Although damages based on speculation or conjecture are not recoverable, damages are not speculative merely because they cannot be ascertained with mathematical precision. It is sufficient if a reasonable basis for computation exists, although the result be only approximate. Moreover, the certainty requirement is relaxed where the fact of damages has been established and the only question to be decided is the amount of damages. (internal citations omitted).

Further, although the evidence admittedly does not lend itself to a precise determination of damages, absolute certainty is not required. "[W]here injury to some degree is found, we do not preclude recovery for lack of precise proof. We do the best we can with what we have." *Id*. at 111, quoting *Purcell v Keegan*, 359 Mich 571, 576; 103 NW2d 494 (1960). "Particularly is this true where it is defendant's own act or neglect that has caused the imprecision." *Hofmann, supra* at 111, quoting *Purcell, supra* at 576.

The evidence adduced at trial indicated that defendant precluded its sales agents from keeping copies of contracts for shows that they sold and that defendant was in sole possession and control of any documentary evidence supporting plaintiff's claims. Defendant produced information regarding 1999 and 2000; however, it did not produce documents regarding 1997 or 1998. Therefore, plaintiff's counsel suggested that if the jury found that plaintiff had established his claim, it might extrapolate damages for amounts not paid in 1997 and 1998 from the documentary evidence regarding 1999 and 2000. Plaintiff's counsel also indicated that this was a rough approach and that if the jury found another method of calculating damages to be more reasonable, it should employ that method in order to determine a fair amount.

Defendant's own record-keeping practices prevented plaintiff from calculating his asserted damages for 1997 and 1998 with precision. The jury was instructed to decide on an amount that would fairly compensate plaintiff based on the evidence presented at trial and not on speculation and conjecture, and there is no reason to believe that they did otherwise. Here, the jury was instructed on the law concerning speculative damages, the case was thoroughly tried by the parties, and the jury apparently believed plaintiff, which was its prerogative. *Fera v Village Plaza, Inc*, 396 Mich 639, 647; 242 NW2d 372 (1976). "'As a reviewing court, we will not

invade the fact-finding of the jury or remand for entry of judgment unless the factual record is so clear that reasonable minds may not disagree.'" *Id*. at 648, quoting *Hall v Detroit*, 383 Mich 571, 574; 177 NW2d 161 (1970). Viewing the evidence in a light most favorable to plaintiff and giving plaintiff the benefit of every reasonable inference, we find that reasonable people could differ regarding a reasonable method of calculating damages; therefore, we decline to disturb the jury's award.

We affirm.

/s/ Bill Schuette
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra